Supreme Court, U.S.
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No. 90-26

In The

Supreme Court of the United States

October Term, 1990

MICHAEL BARNES, Prosecuting Attorney of St. Joseph County, Indiana; LINLEY E. PEARSON, Attorney General of Indiana; and INDIANA ALCOHOLIC BEVERAGE COMMISSION,

Petitioners,

v.

GLEN THEATRE, INC. *et al.*; DARLENE MILLER, *et al.*; and CIVIL CITY OF SOUTH BEND, *et. al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION BY RESPONDENTS DARLENE MILLER and JR'S KITTY KAT LOUNGE, INC.

PATRICK LOUIS BAUDE
929 South Jordan
Bloomington, Indiana 47401
(812) 855-5927
(*Counsel of Record*)

CHARLES A. ASHER
205 First Bank Building
205 West Jefferson Boulevard
South Bend, Indiana 46601
(219) 233-9341

Counsel for Respondents Darlene Miller and JR's Kitty Kat Lounge, Inc.

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RULE 29.1 LISTING

JR's Kitty Kat Lounge, Inc., is an Indiana corporation. It has no parent or subsidiary corporations.

Respondents Darlene Miller and JR's Kitty Kat Lounge respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the opinion of the United States Court of Appeals for the Seventh Circuit.

REASONS WHY THE PETITION SHOULD BE DENIED

1. THE UNCONSTITUTIONALITY OF A TOTAL BAN ON NUDE DANCING HAS BEEN SETTLED BY THIS COURT.

In 1979, the Indiana Supreme Court held that the state's public indecency statute constitutionally applied to dancing in the nude because "This activity is conduct, not speech, and as such, this claim does not rise to the level of a First Amendment claim." *State v. Baysinger*, 272 Ind. 236, 397 N.E.2d 580, 587 (1979), *appeal dismissed sub nom. Clark v. Indiana*, 446 U.S. 931 (1980) and *Dove v. Indiana*, 449 U.S. 806 (1980). Nude dancing itself could therefore logically never be protected by the First Amendment, although the Court reserved judgment whether nude dancing might acquire protection "within the context of a play, ballet, book or other material." 397 N.E.2d at 586.

Two years later, this Court held that "nude dancing is not without its First Amendment protections. . . . " *Schad v. Mt. Ephraim*, 452 U.S. 61, 66 (1981). These two propositions are necessarily inconsistent with each other and, of course, this Court's opinion controls. That is all the Court of Appeals for the Seventh Circuit held in this case,

striking down Indiana's "total ban at issue here." Appendix at 16. The holding below, as the State of Indiana acknowledges in its petition on page 8, is the same conclusion reached by every Circuit to consider the question. The State argues instead that the Court of Appeals' decision is in conflict with some state courts of last resort. Except for Louisiana, *every case* cited by the petitioner was decided before this Court's decision in *Schad*. The Louisiana Supreme court case, *State v. Walters*, 440 So. 2d 115 (La. Sup. Ct. 1983), involved a conviction for attempted obscenity of a woman who, without musical accompaniment, provided a "close and unobstructed view of her vagina" while making thrusting movements. 440 So. 2d at 118. In the present case, the Court of Appeals explicitly pointed out that Indiana "most certainly may ban obscene nude dancing." Appendix at 15.

2. THIS CASE IS NOT AN APPROPRIATE OPPORTUNITY TO CONSIDER THE UNRESOLVED CONSTITUTIONAL QUESTIONS RAISED BY MEASURED STATE REGULATION OF NUDE DANCING.

A. Regulations.

Nude dancing may well not be entitled to the same full measure of constitutional protection as presidential debates. This Court may well find it appropriate to review other regulatory schemes like that in *FW/PBS, Inc. v. City of Dallas*, 110 Sup. Ct. 596 (1990). The issue presented by this Indiana statute as it has been interpreted, however, is a total ban. The state's petition for certiorari says on page 12 that "It is not hyperbolic to suggest that the Seventh Circuit's holding brings within the First

Amendment any person who appears nude in any public place, as long as he or she is dancing." In fact, the majority opinion explicitly holds that "legislative power unquestionably permits the state to bar the imposition of nude dancing upon the public in settings such as streets, parks and beaches." Appendix at 15.

B. Distinctions

Unresolved questions might also arise if a state attempted to articulate a legal standard defining a subcategory of nude dancing which was prohibited. No such standard is articulated in the Indiana statute; the Indiana Supreme Court has held only that nude dancing is conduct, not speech; and the prosecuting authorities of the state have unrelentingly argued this case without attempting to suggest relevant legal distinctions of motive or degree.

On pages 12-13 of its petition for certiorari, the state says "this case potentially invalidates the indecent exposure or public indecency statutes of 17 states (in addition to Indiana) with statutes that proscribe public nudity without expressly requiring lack of consent or offense on the part of the viewer." This statement is supported by a footnote which cites without comment the statutes of twenty-two states. Whatever the number of states to which Indiana means to point, an examination of the cited statutes themselves reveals that the majority of these states, unlike Indiana, do not simply prohibit "nudity" but instead define a subcategory of prohibited nudity.

One common limitation is to prohibit exposure of the genitals "for the purpose of gratifying or arousing sexual desire." Such a limitation is, for example, contained in the Model Penal Code's definition of indecent exposure as part of a plan to limit that crime to "deviate and aggressive sexual exposure." American Law Institute, Model Penal Code and Commentaries, Section 213.5 at 408 (1980). Among the statutes Indiana lists in its petition for certiorari, such mens rea language is found in the cited sections for Arkansas, Colorado, Connecticut, Illinois, Kansas, Oregon (The state's petition cites section 163.445 of the Oregon statutes. That section is a statutory rape section. Respondent believes that petitioner meant to cite 163.465), and Wyoming.

Another common limitation in the cited statutes is to prohibit "lewd" exposure. The Model Penal Code also uses the word "lewd" because it does not include all nudity. "[N]udity may constitute a "lewd act" in appropriate circumstances." American Law Institute, Model Penal Code and Commentaries, Section 251.1 at 450 (1980). Among the statutes listed in the petition for certiorari, lewdness is required in Delaware, Georgia, Illinois, Mississippi and Vermont. Others of the statutes have other limitations, such as "malicious" in South Carolina or "obscene" in Virginia. Respondent believes this point was accurately generalized by Judge Posner's concurring opinion below, when he observed that "Indiana is exceptional although not unique among contemporary American states in attempting, without recourse to the Twenty-First Amendment, to impose a state-wide ban on erotic dance performances that are not obscene, merely because the performances involve nudity – and a bare

breast is nudity within the meaning of the Indiana statute." Appendix at 19.

CONCLUSION

This case involves an extreme statute which the state has made no effort to limit or reconcile with this Court's prior holdings. In its unlimited form, the issue of whether nude dancing is entitled to some protection has already been settled by this Court. For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

PATRICK LOUIS BAUDE
929 South Jordan
Bloomington, Indiana 47401
(812) 855-5927
(Counsel of Record)

CHARLES A. ASHER
205 First Bank Building
205 West Jefferson Boulevard
South Bend, Indiana 46601
(219) 233-9341

Counsel for Respondents